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IN THE

Supreme Court of the United States

October Term, 1969

No. 1168

UNITED STATES OF AMERICA, *EX REL.*
GERALD E. SIGNORELLI,

Petitioner,

v.

LT. COMMANDER ANDREW T. MALLECK,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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LT. COMMANDER ANDREW T. MALLECK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Gerald E. Signorelli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on November 12, 1969.

Citations to Opinion Below

The memorandum opinion of the United States District Court, District of Connecticut, is unreported and is printed in Appendix A hereto, *infra*, p. 1a. The opinion of the United States Court of Appeals, Second Circuit, is unreported and is printed in Appendix A hereto, *infra*, p. 10a.

Statutes Involved

The statutes involved are 50 U. S. C. §454(a); 50 U. S. C. 460(b); 50 U. S. C. §460(b)(3), 50 U. S. C. §460(b)(5). 32 C. F. R. §1628, AR 450-501, Chap. 2, Section XIV, Paragraph 2-28(a) are printed in Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals was entered on November 12, 1969. Notification of judgment is printed in Appendix A hereto, *infra*, p. 11a. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether a Selective Service registrant who presents a claim of medical disability is entitled to a medical interview and the opportunity to present medical evidence before his Local Board.

2. Whether the Local Board improperly delegated its examination, classification and selection functions to the Armed Forces when it inducted the petitioner solely in reliance on the latter's findings of medical acceptability without making its own independent determination of such findings and the petitioner's evidence.

3. Whether the Local Board acted beyond its jurisdiction when it inducted the petitioner without considering his claim of medical unfitness and denied his request for a medical interview.

Statement

Petitioner brought a writ of habeas corpus in United States District Court, District of Connecticut, pursuant to 28 U. S. C. §§2241(c)(1) and 2241(c)(3) alleging that his September 12, 1969 induction into the Army was illegal because Local Board #20 refused to grant him a medical interview and consider a claim that he suffered from a medical disorder which under Medical Fitness Standards disqualified him from military service. The Court issued a temporary restraining order on September 12, 1969

prohibiting the respondent, Commander Andrew T. Malleck, who was in charge of the induction center, from removing the petitioner from the Court's jurisdiction and from subjecting him to military orders pending a hearing on the petition which the Court dismissed in a memorandum of decision on October 15, 1969. Appendix A, *infra*, p. 8a.

The basis of the petitioner's claim was that since 1964 he has been suffering from a severe allergy condition approaching asthmatic proportions which has required continued treatment by an allergy specialist including medication and desensitization injections. Memorandum of Decision, p. 6, footnote 9, Appendix A hereto, *infra*, p. 5a. Transcript of Proceedings, pp. 102 & 116. Petitioner, who was classfied I-A, submitted letters from his physician describing his allergic manifestations and requested a medical interview contending that the Armed Forces physical during which he was found acceptable did not include an allergy examination.[1] The described condition is one listed under the Medical Fitness Standards as a cause for rejection.[2] In denying the petitioner's request for a medical interview as provided in 32 CFR 1628.2(b),[3]

---

[1] See Memorandum of Decision, p. 6, note 9, Appendix A, *infra* p. 5a.

[2] AR. 40-501, Chapter 2, Medical Fitness Standards for Appointment, Enlistment & Induction, Section XIV, Nose, Paragraph 2-28(a) "The causes for rejection for appointment, enlistment, & induction are—a. Allergic manifestations. (1) Chronic atrophic rhinitis. (2) Hay fever if severe; or if not controllable by antihistimines or by desensitization, or both. Appendix B hereto, *infra* p. 18a.

[3] 32 C. F. R. 1628.2(b) "Whenever a registrant who is in Class I-A, Class I-A-O, or Class I-O claims that he has one or more of the disqualifying medical conditions or physical defects which appear in the list described in section 1628.1 the local board shall order him to present himself for interview with the medical advisor to the local board.

the Board notified the petitioner that "the Surgeon General reviewed the case and found the registrant fully qualified for service".[4] Upholding the Board's action, the District Court ruled that the petitioner's claim was reviewed by Col. George W. Sgalitzer, Surgeon General, United States Army Recruiting Command, and by Col. Ralph R. Chapman, Chief, Physical Standards Division, Department of the Army, who found him medically qualified and noted that the petitioner was not prejudiced or deprived of any substantial right merely because the Army reviewed his claim and the draft board did not. Memorandum of Decision, pp. 6 & 7, Appendix A, *infra*, p. 6a.

The United States Court of Appeals, Second Circuit, *per curiam*, affirmed the Judgment of the District Court on November 6, 1969, and entered its judgment on November 12, 1969. Appendix A, pp. 10a, 11a. On December 2, 1969, the United States Court of Appeals granted petitioner's motion for a stay of mandate pending application to this Court for a writ of certiorari. Appendix A, *infra*, p. 12a. An Application for a restraining order pending review on certiorari was denied by this Court on January 12, 1970.

Reasons for Granting the Writ

I

The lower court's decision upholds the Local Board's refusal to consider the petitioner's claim of medical unfitness and request for medical interview on the theory that the Army's consideration of his claim did not deprive the petitioner of any right nor was he substantially prej-

[4] See request for medical interview and reply denying same, Appendix C, *infra* pp. 19a, 20a.

udiced. In establishing the Selective Service System, Congress created a civilian agency to administer the Act and entrusted to it the task of examining, selecting and classifying its registrants 50 U. S. C. §460(b). A claim of medical unfitness and request for medical interview questions the registrant's classification and the Local Board's consideration of the same, involves a quasi-judicial act which cannot be delegated to military personnel. This the trial court does not distinguish from the provisions of 50 U. S. C. §460(b)(5) which merely allow for the use of military medical facilities to assist the Selective Service System's Local Boards in examining registrants.

32 C. F. R. 1628 provides the scheme for handling claims of medical unfitness and requires the Local Board to order a medical interview with its medical advisor whenever it appears that a registrant is suffering from a condition which under the Physical Fitness Standards is designated as a cause for rejection. The responsibility of handling medical unfitness claims has been in large part delegated by the Local Boards to the Armed Forces Examination and Induction Stations and to civilian physicians whom the military employs. However, where questions arise on the adequacy or competency of the A. F. E. E. S. medical findings or where conflicting medical findings are presented by the registrant, the Local Board, with the aid of its medical advisor, must consider all available evidence in determining whether the same will affect the registrant's classification.

In a recent decision, the United States District Court, District of Puerto Rico, interpreted 32 C. F. R. 1628.2(b) and ruled that a registrant has a right to a medical interview whenever a claim is made that he is suffering from a disqualifying condition. *Benitez-Manrique* v. *Micheli*, Civil No. 591-69 (D. Puerto Rico, Nov. 6, 1969), 2 SSLR 3349. Closely resembling the facts in the present case, the petitioner, Benitez-Manrique, brought a writ of habeas

corpus after submitting to induction, alleging that he was improperly denied a medical interview. The District Court concluded that the Local Board failed to comply with the regulations when it attempted to substitute the Armed Forces physical examination for a medical interview. "It is not within the province of a Selective Service Local Board to delegate its functions to one of the interested parties to a proceeding before it."

Although this Court has not dealt specifically with the question presented here, the lower court's ruling is repugnant to several basic principles which the Court has enunciated in interpreting the Selective Service Act and the underlying regulations. In *Estep* v. *U. S.*, 372 U. S. 114 (1946) it emphasized the provisions contained in 50 U. S. C. §460(b) which entrust the function of registration, examination and classification to civilian Local Boards. In *Gonzales* v. *U. S.*, 348 U. S. 407 (1955), the Court ruled that Local Boards must accord the registrants "basic fair play" and a semblance of procedural due process in considering their claims. Draft board proceedings have been given the status of quasi-judicial acts and as such must conform to the basic principles of procedural due process. *Gibson* v. *Reynolds, C. A.* 8 Ark., 172 F 2d 95, cert. den. 337 U. S. 925. It has been equally well recognized that "failure to accord a registrant the procedural rights provided by the Regulations invalidates the action of the draft board." *Knox* v. *U. S.* 200 F 2d 398, 401 (9th Cir. 1952). Action of a local board which is contrary to the Selective Service Act or the regulations prescribed pursuant thereto is beyond the jurisdiction of the board. *Estep* v. *U. S.*, *supra*. Procedural irregularities or omissions which do not result in prejudice to the registrant are to be distinguished from important steps in the induction process. The right to an impartial quasi-judicial consideration of the registrant's claim may very well result in his reclassification and is an indispensible stage in the induction process.

II

The rationale of the lower court's judgment relies solely on the proposition that the petitioner's claim of medical unfitness was properly considered and reviewed by Army personnel and thus the Local Board was not required to give him a medical-interview. Some mention is made of the timeliness of the petitioner's request but there is nothing in the record which indicates that the Board denied the claim because it was untimely. In denying the petitioner's request, the reply is clear that the Board rejected the claim because the same was already reviewed by the Surgeon General's staff. See Appendix C, *infra*, p. 2a.

III

The question presented by this petition affects large numbers of registrants who present their medical unfitness claims to draft boards who are unable to distinguish their responsibility from that of the Armed Forces Examination and Induction Stations which are intended to assist them in providing medical personnel and facilities and not in adjudicating registrants' claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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APPENDIX A—UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

Memorandum of Decision on Petition for a Writ of Habeas Corpus

By this petition for a writ of habeas corpus, Gerald E. Signorelli, a Selective Service registrant, challenges the legality of his induction into the United States Army. Having submitted to induction, a writ of habeas corpus is appropriate for this purpose. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U. S. 233 (1968); *Powers* v. *Powers*, 400 F. 2d 438 (5th Cir. 1968); *Iaino* v. *Secretary of Defense*, 292 F. Supp. 252 (D. S. Car. 1968).

Petitioner claims that his induction was unauthorized because he is afflicted with severe hay fever, a condition which, under the Selective Service's own medical fitness standards, disqualifies him for service in the armed forces. Furthermore, he contends that he was improperly denied a medical interview to establish the presence of his hay fever condition.

The Facts

Petitioner's Selective Service file reveals that from November 19, 1964, until March 21, 1968, he was classified II-S as a full-time college student.

On March 20, 1968, he was ordered to report for a pre-induction physical examination and on the following day he was classified I-A. His physical examination was scheduled for April 10, 1968. Prior to that date, he delivered two letters to the local board. One disclosed the results of a refraction examination by an optometrist. The other, from Dr. Sidney W. Jennes, read as follows:

Appendix A

"To whom so ever this may concern:

"Gerald Signorelli of Torrington, Connecticut has been under my care since April 1964 for treatment of Hay Fever. He is receiving injections every two weeks as prophylactic therapy.

Sincerely,

Sidney W. Jennes, M.D."

These written statements from Dr. Jennes and the optometrist served to amplify his medical history and were reviewed and considered in connection with his preinduction physical examination.[1] AR 601-270, CH. 3, §III, ¶68h(6) at 3-21, SSLR 2260.

The petitioner was found fully acceptable for induction into the armed forces and on April 15, 1968, the local board was so informed by the Armed Forces Examination and Entrance Station (AFEES) in New Haven. The board in turn notified petitioner. Based on this finding of acceptability, a new I-A draft card was sent to the petitioner on April 22, 1968.[2] He requested a personal appearance before his local board,[3] which was scheduled for July 1, 1968. At that hearing, and upon the appeal to the State Appeal Board from the board's action in having again classified him I-A, his sole claim was that the board should not have deprived

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[1] Both letters are stamped on the back: "Reviewed and considered in examinee's physical profile AFEES, NEW HAVEN, CONN.," dated 4/10/68 and signed by Alexander Pinkes, a contract physician. This was pursuant to AR 601-270, Ch. 3, §III, ¶70d at 3-24, SSLR 2261.

[2] 32 C. F. R. §1623.4(a) (1969): "As soon as practicable after the local board has classified or reclassified a registrant . . . it shall mail a notice thereof on a Notice of Classification . . . to the registrant."

[3] 32 C.F.R. §1624.1(1969).

him of his H-S status. During the time it took to process his appeal, he continued his studies. His appeal was rejected on November 6, 1968. On November 18, 1968, he was again classified I-A. On December 20, 1968, he was ordered to report for induction on January 14, 1969. This precipitated a second round of draft board proceedings. On December 27, 1968, he requested a I-S(C) (a temporary deferment for college students to allow them to finish the academic year, or until they leave school, whichever comes sooner). On January 13, 1969, the local board postponed his induction until January 27, 1969, and on January 23, reclassified him as I-S(C). Then on February 6, 1969, after the end of the semester in which he had completed the courses which qualified him for graduation, he was reclassified I-A. The petitioner again appealed, seeking a I-S(C) until September of 1969. This was rejected, and on June 13, 1969, he was again mailed a I-A draft card. On June 18, 1969, he was ordered to report on July 3, 1969, for another armed forces physical examination, and on July 14, 1969, he was ordered to report for induction on August 6, 1969. On August 5, petitioner was notified that his induction, scheduled for August 6, had been postponed "to permit a review of his medical acceptability." Not until August 21, 1969, was he again ordered to report for induction.

The Request for a Medical Review

Finally, on August 23, 1969, after the third order to report for induction, the petitioner, through his attorney, requested the local board for a medical interview[4] "to

[4] The 1968 letters from petitioner's optometrist and allergist, see page 2, *supra*, did not constitute a claim for a medical interview under §1628.2(b). Section 1628.1 provides that the Surgeon General of the Army shall prescribe a list of medical conditions or physical defects that disqualify registrants for service in the armed

(footnote continued on next page)

determine the propriety of his recent acceptability notification." On August 25, other letters were sent to the State Director and the Surgeon General requesting a stay of induction pending the medical interview.

It seems paradoxical that a request for a stay of induction pending a medical interview should be made at this point, since a medical interview had been held earlier, although not initiated at the local board level. On July 14, 1969, the date petitioner was notified of his induction scheduled for August 6, petitioner's father wrote to Senator Abraham Ribicoff complaining of his son's treatment by the Selective Service System. The father wrote another letter of the same tenor to the Senator on July 22. Senator Ribicoff apparently instituted inquiries at the National Headquarters of the Selective Service System which lead to a request on July 29, 1969, from AFEES, New Haven, to the local board and the State Director to return the petitioner to New Haven for a medical consultation [5] on August 1, 1960. In response to a telephoned notice from the local board on July 31, 1969, he went the

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(footnote continued from previous page)

forces. The purpose of a medical interview is to screen and disqualify at the local board level those registrants who have conditions enumerated in the list. Apart from the fact that the letters were not in affidavit form, 32 C. F. R. §1628.3(b)(2)(1969), and the registrant had known about these aspects of his physical condition since 1964 and had never before brought them to the attention of the board, 32 C. F. R. §1625.1(b)(1969), they failed to describe such a disqualifying defect. Hay fever disqualifies only "if severe; or if not controllable by antihistamines or by desensitization, or both." AR 40-501, CH.2, §XIV, ¶ 2-28 at 2-14, SSLR 2210. Had the letters described such a defect, the board might have been required to act on its own volition. 32 C. F. R. §1628.2(a)(1969). The presumption is that the local board processed him in accordance with the applicable statutes and regulations. *Oastereich* v. *Selective Service System Local Board No. 11, supra* at 241 (Harlan, J., concurring).

[5] AR 601-270, CH. 3, §III, ¶ 65h(4) at 3-31, SSLR 2260.

next day to see Dr. William W. Esdaile, a civilian doctor under contract with AFEES to perform medical examinations.[6]

The Merits

Petitioner claimed that he suffered from a disqualifying medical condition specified in the regulations.[7] Dr. Esdaile was fully qualified to determine whether he did. His examination of the petitioner was in full compliance with the regulations. 32 C. F. R. §1628.3 (1969).[8] There was no relaxation of the standards for determining whether there was a cause for his rejection. After examining the petitioner and his full medical record, including letters from his own doctors,[9] he concluded that the peti-

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[6] AR 601-270, CH. 3, §III, ¶ 65b(4) at 3-15, SSLR 2257.

[7] Page 3 and note 3, *supra*.

[8] If there was any deviation from the regulations because Dr. Esdaile was a contract physician, paid for his services, rather than a volunteer appointed by the President, 32 C. F. R. §1604.61(1969), this did not cause any substantial prejudice to the petitioner. *Olguin* v. *United States*, 392 F. 2d 329, 330 (10th Cir. 1968); *Laine* v. *Secretary of Defense*, 292 F. Supp. 252, 255 (D. S. Car. 1968). *Cf. Smith* v. *Reser*, 406 F. 2d 141, 146 (2d Cir. 1969).

[9] On July 25, 1969, petitioner submitted a letter from his allergist, Dr. Jennes:

> "To whom this may concern:
>
> "Gerald Signorelli has been under my care since 1964 for treatment of Hay Fever. He has had severe episodes in the past, sometimes requiring cortisone to control his trouble. He must receive injections of an extract of the pollen every two weeks to control the Hay Fever and prevent Asthma.
>
> Sincerely yours,
>
> SIDNEY W. JENNES, M.D."

(footnote continued on next page)

tioner had: "Mild to Moderate Hay Fever. This man could probably do just as well with anti histamines. Fit for military Service." (Government's Exhibit A).

Indeed, the evidence shows that complete medical records, including Dr. Esdaile's report, were reviewed by Col. George W. Sgalitzer, Surgeon General, United States Army Recruiting Command, and by Col. Ralph R. Chapman, Chief, Physical Standards Division, Department of the Army, both of whom also found the petitioner medically qualified under current medical fitness standards.

The fact that the impetus for the interview was initiated from the level of National Headquarters did not deprive petitioner of any right, nor cause him any substantial prejudice.[10] The petitioner suggests that Operations Bulletin No. 327 [11] is an unwarranted short cut of the regulations. That Bulletin provides that when a late claim of a disqualifying medical condition ("one that has not been previously presented and evaluated by the Local Board Medical Advisor or the Armed Forces Examining and Entrance Station") is presented after "the registrant has

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(footnote continued from previous page)

On July 31, 1969, he submitted a letter from Dr. Vanoni, his family doctor, saying:

> "To Whom It May Concern:
>
> "Re: Gerald Signorelli
>
> "Gerald Signorelli has been referred to an allergist and is now being seen regularly every three months. He must also carry medication with him at all times.
>
> "Gerald is still under treatment for this condition.
>
> Sincerely yours,
>
> FRANK R. VANONI, M.D."

[10] See note 8, *supra,* and cases cited therein.

[11] SSLR 2200:60-61.

already had his physical examination" and an induction order has already been issued,[12] the evidence should be presented to the examining physician at the time of induction. But this is a red herring. Although the claim in this case was made by the petitioner after he had been both properly "screened" [13] and examined, it is not necessary to determine whether the Operations Bulletin constitutes a binding interpretation of 32 C. F. R. §1628.2(b). *Cf. Lawrence* v. *Commanding Officer*, 58 F. Supp. 933 (D. Neb. 1945); *Ex parte Stewart*, 47 F. Supp. 415 (S. D. Cal. 1942). In this case, the basis for evaluation of the petitioner's claim was not limited to the evidence he would have presented at the examining station, as prescribed by the Bulletin. His late claim was given all the consideration it would have received if timely presented. He was given a full examination by a qualified physician to determine whether he suffered from the claimed disqualifying medical condition.

At the hearing in this court, the petitioner also argued that his examination by Dr. Esdaile was inadequate for lack of scratch tests or patch tests. His own experts testified that these were significant only for determining to what substances he was sensitive, not the degree of severity of his allergy. Furthermore, his own allergist, Dr. Jennes, testified that his hay fever is not now severe and that the injections he had been receiving have controlled it. His estimate was that the petitioner's hay fever is moderate, as distinguished among the degrees—mild, moderate and severe.

The burden is on the petitioner to show that his local board had "no basis in fact" for classifying him as I-A

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[12] On July 14, petitioner was ordered to report for induction on August 6, 1969.

[13] See note 4, *supra*.

and ordering him to report for induction. *Estep* v. *United States*, 327 U. S. 114, 122 (1946);[14] 50 U. S. C. App. §460(b)(3) (Supp. IV, 1969).[15] There was ample basis in fact for the determination that his hay fever was not sufficiently severe to qualify as a cause of rejection. Consequently, he was properly classified I-A.

On the basis of the foregoing findings and conclusions, the petition is dismissed.

SO ORDERED.

The temporary restraining order heretofore issued pending the court's decision in this case is continued in effect until October 22, 1969, in order to permit an application to the Court of Appeals for a further stay if deemed advisable.

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[14] See cases cited note 8, *supra*.

[15] 50 U. S. C. App. §460(b)(3) provides in part:

> ". . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title (section 462 of this Appendix), after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant, . . ."

By this proviso, Congress has codified the existing case law, *e.g.*, *Estep* v. *United States*, 327 U. S. 114 (1946); *United States* v. *Jacobson*, 325 F. 2d 409 (2d Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U. S. 163 (1965); *Benzian* v. *Godwin*, 168 F. 2d 952 (2d Cir.), *cert. denied*, 335 U. S. 886 (1948).

Appendix A

Dated at Hartford, Connecticut, this 15th day of October, 1969.

M. Joseph Blumenfeld
United States District Judge

A true copy

Attest:

Gilbert C. Earl
Clerk, U. S. District Court

By: (Illegible)
Deputy Clerk

Appendix A

United States Court of Appeals, Second Circuit
Per Curiam Decision

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 390—September Term, 1969.

(Argued November 6, 1969 Decided November 6, 1969.)

Docket No. 34199

[SAME TITLE]

Before:

WATERMAN, FRIENDLY and SMITH,
Circuit Judges.

Appeal from dismissal, after a hearing, of petition for a writ of habeas corpus, United States District Court for the District of Connecticut, Blumenfeld, J. Affirmed on opinion below.

ZBIGNIEW F. ROZBICKI, Hartford, Conn., *for Appellant.*

J. DANIEL SAGARIN, Asst. U. S. Attorney, Stewart H. Jones, U. S. Attorney, New Haven, Conn., *for Appellee.*

PER CURIAM:

Appellant, who claims that his Selective Service Board, contrary to statute, failed to give him a medical interview for a disqualifying physical condition, which failure resulted in his having been inducted into the Armed Forces, seeks reversal of the judgment below dismissing after a

hearing his petition for habeas corpus in which he alleges the Armed Forces unconstitutionally restrained his liberty, United States District Court for the District of Connecticut, Blumenfeld, J.

We affirm the judgment below upon the opinion of October 15, 1969 of U. S. District Judge Blumenfeld.

Notice of Judgment—United States Court of Appeals Second Circuit

(Letterhead of Court of Appeals)

November 12, 1969

U. S. ex rel. GERALD G. SIGNORELLI

vs.

LT. COMMANDER ANDREW T. MALLECK

Dear Sirs:

The Court has today handed down a decision in the above entitled cause affirming in open court the decision of the district court.

A copy of the opinion will be mailed to you Friday.

Additional copies of opinions may be obtained from this office in accordance with §0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Appendix A

Your attention is directed to the provision of Rule 39(c) F. R. A. P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. DANIEL FUSARO
Clerk

Order Granting Motion for Stay of Mandate Pending Application for Certiorari

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of December, one thousand nine hundred and sixty-nine

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UNITED STATES ex rel. GERALD E. SIGNORELLI,

Petitioner-Appellant,

v.

LT. COMMANDER ANDREW T. MALLECK,

Respondent-Appellee.

It is hereby ordered that the motion made herein by counsel for the appellant to stay issuance of the mandate pending application to the Supreme Court for a certiorari to Rule 41(b) Federal Rules of Appellate Procedure be and it hereby is granted

STERRY R. WATERMAN
HENRY J. FRIENDLY

APPENDIX B

Regulations

MEDICAL INTERVIEW BY LOCAL BOARD

§1628.1. Purpose of medical interview.

The Surgeon General of the Department of the Army shall, from time to time, prescribe or approve a list enumerating various medical conditions or physical defects that disqualify registrants for service in the Armed Forces. A medical interview of certain registrants by the medical advisor to the local board shall be accomplished for the purpose of screening and disqualifying at the local board those registrants who have conditions or defects enumerated in the list.

§1628.2 Registrants to be given medical interview.

(a) Whenever the local board is of the opinion that a registrant in Class I-A, Class I-A-O, or Class I-O has one or more of the disqualifying medical conditions or physical defects which appear in the list described in section 1628.1, it shall order the registrant to present himself for medical interview at a specified time and place by mailing to such registrant a Notice to Registrant to Appear for Medical Interview (SSS Form No. 219).

(b) Whenever a registrant who is in Class I-A, Class I-A-O, or Class I-O claims that he has one or more of the disqualifying medical conditions or physical defects which appear in the list described in section 1628.1, the local board shall order him to present himself for interview with the medical advisor to the local board at the time and place specified by the local board by mailing to such registrant a Notice to Registrant to Appear for Medical Interview (SSS Form No. 219).

Appendix B

(c) Whenever, because of a medical condition or physical defect, a registrant is unable personally to present himself for medical interview, a reputable physician may file an affidavit, or an authorized representative of a Federal or State agency may file an official statement with the local board, stating (1) the character of the condition or defect, (2) that the physician has personal professional knowledge thereof, or that the representative has official knowledge thereof, and (3) that the registrant is unable personally to present himself for medical interview due to the character of the condition or defect. The local board shall refer such affidavit or official statement which it receives to the medical advisor to the local board for review.

§1628.3 Duties of medical advisor to local board.

(a) When the registrant is referred to the medical advisor to the local board for medical interview, the medical advisor shall make only such examination as he deems is necessary to determine whether the registrant has one or more of the disqualifying medical conditions or physical defects which appear in the list described in section 1628.1. No laboratory or X-ray work shall be authorized but reports of laboratory or X-ray work performed previously and presented by the registrant may be given consideration by the medical advisor. It shall be the duty of the registrant to present himself to the medical advisor to the local board at the time and place designated and to submit to examination.

(b) The medical advisor to the local board shall (1) give each registrant who presents himself for medical interview such examination as he deems necessary or (2) review each affidavit of a reputable physician or official statement of a representative of a Federal or State agency referred to him by the local board. From such examination or review, the

medical advisor to the local board shall determine whether the registrant has one or more of the disqualifying medical conditions or physical defects which appear in the list described in section 1628.1 and shall record his findings in Section II of the Record of Induction (DD Form No. 47).

§1628.4 Duties of local board.

(a) When no medical advisor to the local board is available, the local board, to the extent that it is capable of doing so, shall make the examination, review, and finding provided for in §1628.3.

(b) When a registrant is ordered to appear for medical interview the local board shall:

(1) Prepare an original and three copies of the Record of Induction (DD Form No. 47) and send the original to the medical adviser to the local board for the entry of his findings after the medical interview.

(2) Enter on the Classification Questionnaire (SSS Form No. 100) the date the Notice to Registrant to Appear for Medical Interview (SSS Form No. 219) was mailed to the registrant and the date upon which he is ordered to appear.

(c) After completion of the medical interview the local board shall determine, after considering the findings and recommendations of the medical advisor to the local board, whether or not to order the registrant to report for armed forces physical examination. The local board shall enter the date of the medical interview in the appropriate column of the Classification Record (SSS Form No. 102).

(d) If the local board determines that the registrant has a disqualifying medical condition or physical defect which appears in the list described in section 1628.1, the following action shall be taken:

Appendix B

(1) The local board shall file the original and one copy of the Record of Induction (DD Form No. 47) in the registrant's Cover Sheet (SSS Form No. 101) and forward two copies of the Record of Induction (DD Form No. 47) to the State Director of Selective Service who shall forward one copy to the Surgeon General Department of the Army, Washington, D. C., and retain one copy.

(2) The local board shall review the classification of the registrant and if it finds under the provisions of Part 1622 of this chapter that he should be placed in some other class, reopen his classification and classify him anew and mail him a Notice of Classification (SSS Form No. 110).

(3) The local board shall cancel any Order to Report for Armed Forces Physical Examination (SSS Form No. 223) which it has mailed to the registrant and advise him in writing of such cancellation.

(4) The local board shall note in the "Disposition" column of the Physical Examination List (SSS Form No. 225), if the registrant's name appears thereon, that he has been found not qualified for service in the Armed Forces.

(c) If the local board determines that the registrant does not have a disqualifying medical condition or physical defect which appears in the list described in §1628.1, or if the local board has any doubt concerning the existence of any such condition or defect, the local board shall order the registrant to report for armed forces physical examination as provided in section 1628.11.

§1628.5 Transfer for medical interview.

(a) Any registrant who has received a Notice to Registrant to Appear for Medical Interview (SSS Form No. 219) and who is so far from his own local board that presenting himself to the medical advisor to his local board would be a hardship may file a written request with the local board

having jurisdiction of the area in which he is at that time located for his transfer for medical interview to that local board. The local board with which the request for transfer for medical interview is filed shall forward the request to the registrant's own local board.

(b) Upon receiving such request for transfer for medical interview the registrant's own local board shall prepare and forward the original and three copies of the Record of Induction (DD Form No. 47) to the local board of transfer and shall enter on the Classification Questionnaire (SSS Form No. 100) the date such forms were forwarded and the designation of the local board of transfer.

(c) The local board of transfer shall arrange for the medical interview of the registrant and on completion shall return the original and three copies of the Record of Induction (DD Form No. 47) to the registrant's own local board which shall take the further action required by §1628.4 (c), (d), and (e).

Appendix B

C 15, AR 40-501

2-28. Nose

The causes for rejection for appointment, enlistment, and induction are—

a. Allergic manifestations.

(1) Chronic atrophic rhinitis.

(2) Hay fever if severe; or if not controllable by antihistamines or by desensitization, or both.

b. Choana, atresia, or stenosis of, if symptomatic.

c. Nasal septum, perforation of:

(1) Associated with interference of function, ulceration of crusting, and when the result of organic disease.

(2) If progressive.

(3) If respiration is accompanied by a whistling sound.

d. Sinusitis, acute.

e. Sinusitis, chronic, when more than mild:

(1) Evidenced by any of the following: Chronic purulent nasal discharge, large nasal polyps, hyperplastic changes of the nasal tissues, or symptoms requiring frequent medical attention.

(2) Confirmed by transillumination or X-ray examination or both.

APPENDIX C

Request for Medical Interview

ZBIGNIEW S. ROZBICKI
ATTORNEY AT LAW

August 23, 1969

Mrs. Eleanor W. Scully
Executive Secretary
Local Board #20
Selective Service System
City Hall
Torrington, Connecticut

Re: Gerald E. Signorelli

Dear Mrs. Scully:

On behalf of my client, Gerald E. Signorelli, kindly file my request with the Board for a medical review to determine the propriety of his recent acceptability notification.

Medical information to date and his rejection for enlistment by the three branches of military service on the basis of medical disqualification make this request necessary.

Thank you.

Yours truly,

ZBIGNIEW S. ROZBICKI

ZSR:kmg

Appendix C

Denial of Medical Interview

Local Board No. 20
City Hall
Torrington, Conn.

September 4, 1969

Zbigniew S. Rozbicki, Attorney at Law
255 Main St.
Torrington, Conn.

Re: Gerald E. Signorelli #6-20-46-490

Dear Mr. Rozbicki:

Your letter of August 23rd was reviewed by the Board at their meeting today.

The Surgeon General reviewed the case and found the registrant fully qualified for service.

By Direction of the Board

Eleanor W. Scully, Exec. Sec'y
Local Board #20

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1168

GERALD E. SIGNORELLI, PETITIONER

v.

ANDREW T. MALLECK, LIEUTENANT COMMANDER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut seeking his discharge from the Army on the ground that he was not medically qualified for military service and that the selective service board had violated its rules by not granting him a "medical interview" upon his request (T. 32, 40 83).[1]

[1] "T." refers to the one-volume transcript of hearings held in the district court on September 15 and 24, 1969, separately paginated. All page references used refer to the September 24 hearing transcript. "S.S. File" refers to numbered pages in petitioner's selective service file, admitted into evidence (T. 10). The individual exhibits also admitted into evidence are contained in this file. All of these are on file with the Clerk of this Court.

379-264——70

In a thorough memorandum opinion fully detailing the relevant facts, the district court (Judge Blumenfeld) denied relief (Pet. App. 1–8), and the court of appeals affirmed *per curiam* (Pet. App. 10–11).

The opinion of the district court, on which we rely, recites in full detail petitioner's Selective Service history of student deferments and medical examinations both before and after he was ordered to report for induction in August 1969. While petitioner states that the basis of his claim was that since 1964 he had suffered from a severe allergy condition "approaching asthmatic proportions" which required treatment by an allergist (Pet. 3), petitioner's own allergist at the hearing before the district court described petitioner's condition in 1969 as only "moderate" in degree (T. 115). His condition had been controlled for years by either antihistamines or desensitization innoculations (T. 40).[2]

Moreover, petitioner requested the "medical interview" after he had already been examined, found acceptable for induction, and had been ordered to report. Petitioner's request to his local board was thus untimely. Medical interviews by the medical advisor to the local board are "for the purpose of screening and disqualifying at the local board those registrants who have [disqualifying] conditions * * *" (32 C.F.R. 1628.1; Pet. App. B 13a). They are designed to be a screening step, to eliminate sending obviously inca-

[2] A third examination of petitioner, at the request of the assistant United States attorney, accomplished on September 23, 1969, revealed "no evidence of any nose or throat disease" (Govt. Ex. 6, T. 175).

pacitated registrants for a physical examination at an Armed Forces Examining and Entrance Station (AFEES). They are not procedures to be employed after an order to report for induction (see S.S. File 25).

Petitioner's reliance (Pet. 5) on the case of *Benitez-Manrique* v. *Micheli*, 305 F. Supp. 334 (D., P.R.), cannot be supported. When the defendant in that case registered, he stated and substantiated the fact that he suffered from a heart condition which had required surgery. He later submitted a second claim that he suffered from a disqualifying medical condition. Nevertheless, Benitez-Manrique was ordered to report for induction. Based on such facts, the court in that case found "that the registrant raised his claim timely" (305 F. Supp. at 337) and that his local board had violated its own rules by not sending him the forms to request a medical interview "before he had been sent any induction order" (305 F. Supp. at 338). Petitioner's case is the direct opposite as he made no claim of a physical defect when he initially registered (T. 43) and never did seek deferment on physical grounds, prior to receipt of his order to report for induction.

While petitioner argues that the district court "concluded that the Local Board failed to comply with the regulations" concerning a medical interview examination (Pet. 6), the district court merely held that if there was any deviation from the regulation it was harmless (Pet. App. A, 5a, n. 8). The regulation on which petitioner relies (1628.2(b)) applies

to registrants who have not yet been physically examined and found acceptable. The district court, in fact, concluded that petitioner's "late claim was given all the consideration it would have received if timely presented" (Pet. App. A, 7a).[3]

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1970.

[3] Thus, as a result of inquiries apparently initiated by a United States Senator, petitioner, after being accepted at the local Armed Forces Examining and Entrance Station, was sent to a civilian specialist, Dr. Esdaile, a civilian doctor under contract with AFEES to perform medical examinations.

After a full examination, Dr. Esdaile concluded that petitioner was "[f]it for military service." His report was reviewed by a physician in the Surgeon General's Office and a physician in the Department of the Army, who concurred that he qualified for service (Pet. App. A 4–6).

U.S. GOVERNMENT PRINTING OFFICE: 1970